No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, Amicus National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

NTUF has worked extensively to analyze and provide testimony about the central questions contemplated by this case, including the launch of a project called the "Interstate Commerce Initiative" to explore the policy implications of extraterritorial actions by States. A decision by this Court abrogating *Quill*—the result urged by Petitioner—will have widespread impacts on taxpayers, tax administration, and ongoing legislative and judicial disputes at both the state and federal levels. For these reasons and others, NTUF has an institutional interest in the Court's actions in this case.

SUMMARY OF ARGUMENT

Ostensibly, the Petition asks this Court to consider whether it should abrogate the bright-line physical-presence test it established in *Quill Corp. v. North Dakota*[2] for the purpose of satisfying the requisite substantial nexus test under the Commerce Clause for

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than the NTUF or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. On October 16, 2017 and October 19, 2017, respectively, Petitioner and Respondents gave blanket consent to amicus briefs. These blanket consents were docketed more than 10 days before the due date of this brief.

[2] 504 U.S. 298 (1992).

the collection of sales and use taxes from out-of-state sellers. Petitioner effectively concedes that a bright line is necessary, but it proposes to substitute its own alternative test based upon newly enacted and very low thresholds established by the South Dakota legislature.

In effect, Petitioner asks the Court to assume that the State may impose on any seller of products, no matter how remote their relation to the State may be, a legal obligation to monitor each and every transaction that leads to a "delivery" within the State for the purpose of ensuring compliance with South Dakota's statutory tests.[3] This obligation apparently attaches regardless of the location or domicile, domestic or foreign, of the seller and even of the purchaser. An Illinois resident may purchase a product in New York for delivery to South Dakota that would trigger this monitoring requirement.

Petitioner also asks the Court to replace *Quill*'s bright-line test with Petitioner's own thresholds for determining when an out-of-state seller has a "substantial nexus" to the taxing jurisdiction without due consideration (or any consideration, for that matter) of whether those same thresholds pass constitutional muster under the Due Process Clause. No finding in the record below supports the assumption that the State's new thresholds, if satisfied, would establish a seller's minimum connections with the State for purposes of satisfying the Due Process Clause of the Constitution.

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[3] *Amicus* assumes, for the sake of argument only, that a State even has the authority to require all sellers to collect such data in the first place.

In so doing, Petitioner asks this Court to engage in the kind of legislative rulemaking that the Court sought to avoid in *Quill*, and to do it in a vacuum. As the Court observed in *Quill*, these difficult issues necessarily must be resolved by Congress, not the Court. Conversely, a grant of certiorari in this case may very well stymie the work of Congress to craft legislative solutions to these complex, difficult matters of interstate commerce.

There is no pressing need to revisit *Quill* now. Petitioner's claims that time and technological advancement have rendered *Quill*'s interstate commerce protection outdated are overstated. Sales tax complexity has, in many ways, grown worse in the intervening years between the *Quill* ruling and this case. Reportedly, there are more than twice as many taxing jurisdictions as there were when *Quill* was decided in 1992. Multistate efforts to simplify sales tax codes have likewise failed to reach agreement even on matters as basic as uniform standards for sourcing transactions. Software advancements, while significant, ultimately do little to address the biggest driver of sales tax complexity: determining taxability in the first place. Granting certiorari in this case would put at risk Congress's determination thus far that States are unable or unwilling to simplify sales taxes sufficiently to justify the grant of new powers to tax interstate commerce.

Further, maintenance of sellers' well-settled expectations regarding the applicability of state sales and use taxes weighs in favor of denying certiorari. Remote commerce in America today is premised on the common sense standard articulated by this court in *Quill*. Revisiting this standard in the context of this case would likely raise more questions than it could answer

about the morass of state legislation and litigation. While granting certiorari might allow the Court to resolve South Dakota's law and other state laws like it, it would throw into turmoil proceedings in dozens of other States that have pursued different approaches. Denying certiorari, however, would have the effect of reinforcing that Congress is the proper venue for the regulation of interstate commerce, that process matters and the prior decisions of this Court must be adhered to, and that *Quill* remains the law of the land until Congress chooses to legislate a different standard.

The Court should deny certiorari.

ARGUMENT

I. THIS CASE'S FAILURE TO CONSIDER DUE PROCESS CONCERNS AND ITS NARROW RECORD RENDER IT AN INAPPROPRIATE VEHICLE FOR ABROGATING *QUILL*

A. This Case Lacks Consideration Of Due Process, Thus Stymieing This Court's Ability To Reconsider *Quill* In The Context Of This Case

The Constitution limits a State's taxing authority over interstate business through two constraints: the Due Process Clause, U.S. CONST. amend. XIV, § 1, and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Although "not always sharply separable," these constitutional constraints "differ fundamentally," "reflect different constitutional concerns[,]" and carry with them different congressional authorities.[4] *Quill*, 504 U.S. at 305-

[4] "[W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, . . . it does not similarly have the

06 (quoting *Int'l Harvester Co. v. Dep't of Tres.*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)). Due Process "concerns the fundamental fairness of governmental activity[,]" *id.* at 312, and requires "some definite link, some minimum connection, between [the] state and the person, property or transaction it seeks to tax[,]" *id.* at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). On the other hand, whether governmental activity satisfies the dormant Commerce Clause is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* at 312. As such, the Court has endeavored to approach these constitutional constraints "as if they were separate and distinct, not intermingled." *Id.* at 305-306 (quoting *Int'l Harvester Co.*, 322 U.S. at 353 (Rutledge, J., concurring in part and dissenting in part)).

In *Quill*, the Court separately considered the constitutionality of a North Dakota use tax law, first, under the Due Process Clause and, second, under the Commerce Clause. *See id.* at 306-19. The Court's two-step process was logical – if a State's exercise of authority fails to conform to Due Process, that is the end of the inquiry.

Like *Quill* before it, this case involves a State's application of its taxing statute to out-of-state sellers, and therefore implicates both the Due Process and the Commerce Clauses of the Constitution. The court below decided the unconstitutionality of the South Dakota law (Senate Bill 106) solely on Commerce Clause grounds. *State v. Wayfair Inc.*, 901 N.W.2d 754

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power to authorize violations of the Due Process Clause." *Quill*, 504 U.S. at 305 (internal citations omitted).

(S.D. 2017). It never addressed whether the State's proposed, and greatly diluted, replacement for *Quill*'s bright-line physical-presence test met the threshold requirements of Due Process. On the record before it, the court below could not consider Due Process. And if the Court grants certiorari, that same record will prevent the Court from deciding whether South Dakota's proposed replacement for *Quill* satisfies both Due Process *and* Commerce Clause concerns.[5]

Even if the record below were developed enough for this Court to address the legitimacy of South Dakota's actions under the Due Process Clause, it is highly questionable that the State's minimum criteria for application of its use tax would pass constitutional muster. The discussion in the Petition focuses on "sales," and in fact, South Dakota's very low-dollar threshold is described in those terms. Pet. Cert. 8. Indeed, the archetypal case, where an in-state purchaser buys products online for delivery to his or her own address is the kind of transaction that immediately comes to mind. But this is not that case. A transaction between

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[5] Senate Bill 106 sets out two criteria, either of which would trigger an out-of-state seller's obligation to comply with South Dakota's sale tax laws. Those criteria are:

> (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
>
> (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

S.B. 106, 91st Legis. Assemb. § 1 (S.D. 2016). The effect is to treat the out-of-state seller as if it "had a physical presence in the state." *See id.*

a purchaser and seller, neither of which is a resident of or located in the State, can be swept up into South Dakota's scheme solely on the basis of a "delivery" by a common carrier to the State. There can be no presumption that such a transaction automatically involves the seller's "purposefully" availing itself of the benefits of the State's economic market for the purpose of asserting taxing jurisdiction over the seller.[6] *See Quill*, 504 U.S. at 315-16; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). It is even conceivable that the State's $100,000 gross revenue threshold could be satisfied by a single sale or transaction. Although a single act may be enough to satisfy due process concerns where that single act "creates a 'substantial connection' with the forum[,]" *Burger King*, 471 U.S. at 475 n.18, a single sale within a State seems too tenuous a connection to satisfy Due Process, *see Gordon v. Holder*, 826 F. Supp. 2d 279, 291 (D.D.C. 2011):

> At this stage in the proceedings, the Court cannot find that each of Gordon's sales establishes the requisite minimum contacts with the states in which he sells his products such that the PACT Act's tax provisions satisfy due process. That is, the Court cannot say that Gordon's business "purposefully avails itself of the benefits of [the] economic market" of the states into which he sells his products or that it "purposefully directed its activities" at residents of these states.

(citing *Quill*, 504 U.S. at 307-08), *aff'd*, 721 F.3d 638 (D.C. Cir. 2013).

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[6] Indeed, in order to protect itself from such a result, the seller would have to refuse delivery into the State. That, of course, would create a direct restraint on interstate commerce.

B. South Dakota's "Fast Track" Process Makes This A Problematic Vehicle For Broad-Based Review Of *Quill*

The suitability of this case as a vehicle for this Court's reconsideration of *Quill* is suspect also because of the manner in which South Dakota legislated, and then litigated, its way to this Court. Rather than working through its representatives in Congress to advance legislation that would permit broader use taxes on interstate commerce or increasing enforcement of use tax collection from its residents, South Dakota chose to pass legislation that directly conflicted with the restrictions imposed upon it by *Quill*. Senate Bill 106 explicitly acknowledges that this Court's doctrine "prevents states from requiring remote sellers to collect sales tax," recognizes that "the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question," and repeatedly refers to the need for "expeditious review" of litigation that it knew was forthcoming due to the shaky legal foundation upon which the law was built. S.B. 106, 91st Legis. Assemb. (S.D. 2016). Additionally, South Dakota wrote into the bill the mechanics for immediate enforcement in court against "any person," even those who "[do] not have a physical presence in the state" and regardless "whether or not the state initiates any audit or other tax collection procedure," solely on the State's belief that such person may have exceeded gross revenue of $100,000 or 200 transactions for goods delivered to the State. *Id.* at § 1.

South Dakota's race to this Court's front steps has contributed to the infirmities of the case as a broad-based vehicle for review of *Quill*. As discussed in Point I.B above, the breakneck speed at which this case

reached the Court has resulted in a factual record that cannot support the rigorous constitutional analysis that must accompany any reconsideration of *Quill*. And as discussed in Point II below, South Dakota's decision to legislate and litigate, rather than seeking additional taxing authority from Congress, may very well place this Court (and its lower courts) in the position of rendering case-by-case evaluations of constitutional legitimacy every time a State's attempt at taxing remote sellers is challenged. *See Quill*, 504 U.S. at 314-15:

> [T]he bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only on a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach. . . .

Further, simply by granting certiorari, the Court runs the risk of encouraging other States to pursue similarly flawed approaches.

II. EVEN WERE THIS COURT TO RECONSIDER *QUILL* ON COMMERCE CLAUSE GROUNDS ALONE, DOING SO IN THE CONTEXT OF THIS CASE WOULD PLACE THE COURT IN A POSITION OF LEGISLATIVE RULEMAKING FOR DECADES TO COME

A. *Quill* Firmly Established That Proper Reconsideration Of *Quill*'s Bright-Line Standard For Sales And Use Taxes Lies With Congress

In *Quill*, the Court clearly described the Commerce Clause implications of remote sales taxes "not only [as] one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." *Id.* at 318. Congress is the final authority on whether, and to what extent, remote sales taxes burden interstate commerce. *See id.* at 318 (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946)) ("No matter how [the Court] evaluate[s] the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with [the Court's] conclusions."). Further, overturning *Quill*'s bright-line rule in the context of this case may very well (as it could have in *Quill*) "raise thorny questions concerning the retroactive application of [state sales and use] taxes and might trigger substantial unanticipated liability" in other cases. *Id.* at 318 n.10. The same considerations are present here and play an even greater role given the exponential increase in taxing jurisdictions since *Quill* was decided.[7] Then and now, Congress is better

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[7] In *Quill*, the Court noted with concern the existence of some 6,000 taxing jurisdictions nationwide that would be encouraged to impose tax collection obligations should the Court have decided *Quill* differently. *See Quill*, 504 U.S. at 313 n.6. Today, tax

equipped to resolve the "precise allocation of [the] burdens" resulting from a change to *Quill*'s status quo. *Id.* Congress possesses the "power to protect interstate commerce from intolerable or even undesirable burdens." *Id.* at 318 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637 (1981) (White, J., concurring)). A denial of certiorari in this case would permit Congress the time and space to exercise that power in the context of established legislative process.

B. Denial Of Certiorari Would Permit Congress To Continue Its Efforts To Establish A Legislative Standard For Remote Sales Tax Collection

Declining certiorari would permit Congress the time and space to craft a legislative solution to the remote sales tax collection issues presented in this case. Recent legislation evidences this Congress's awareness of these issues.[8] South Dakota's Member of Congress, Representative Noem, is the lead sponsor of H.R. 2193, the Remote Transactions Parity Act of 2017. Remote Transactions Parity Act, H.R. 2193, 115th Cong. (2017). H.R. 2193 proposes to grant remote sales tax collection powers to every State (including South Dakota) that is a member of the Streamlined Sales and Use Tax Agreement (SSUTA), a multistate effort to simplify sales tax codes, and to States that implement certain minimum simplifications to their tax codes.

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software provider Avalara touts as a selling point for its service that there are more than 12,000 taxing jurisdictions across the country. Jaimy Ford, *Tracking Sales Tax Rates Across Thousands of Jurisdictions*, Avalara (June 25, 2015), https://www1.avalara.com/trustfile/en/blog/tracking-sales-tax-rates-across-thousands-of-jurisdictions.html (hereinafter, *Tracking Sales Tax Rates*).

[8] In fact, several pieces of legislation introduced this session would effectively resolve the questions at issue in this case.

Similar legislation has been introduced in the U.S. Senate. *See* Marketplace Fairness Act, S. 976, 115th Cong. (2017). Conversely, other recently proposed legislation seeks to codify this Court's decision in *Quill* by establishing a statutory physical-presence standard to govern state attempts at taxing or regulating interstate commerce.[9] *See* No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017); *No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders: Hearing on H.R. 2887 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. (2017).

Although the legislative process may not bring about the exact result sought by South Dakota, it will provide one that balances the positions of all constituent interests, anticipates the growing pains that follow enactment, and provides for the proper allocation of resulting burdens. *See Flood v. Kuhn*, 407 U.S. 258, 279 (1972):

> Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of Congressional action would be known

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[9] This bill came on the heels of another proposal last year that would have authorized States to tax interstate commerce if they were the origin State for the item and would have established a revenue-sharing arrangement between participating States. Allison Enright, *Lawmakers Queue Up a Simplified Online Sales Tax Bill*, Digital Commerce 360 (Aug. 25, 2016), https://www.digitalcommerce360.com/2016/08/25/lawmakers-queue-simplified-online-sales-tax-bill/.

> long in advance, and effective dates for legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.

(citation omitted) (internal quotation marks omitted).

C. Denial Of Certiorari Would Maintain Well-Settled Expectations Of Sellers Nationwide While Congress Crafts A Comprehensive Legislative Solution

Collectively, more than $400 billion in sales were conducted remotely in the last year, by millions of businesses employing millions of individuals. Stefany Zaroban, *US e-Commerce Sales Grow 15.6% in 2016*, Digital Commerce 360 (Feb. 17, 2017), https://www.digitalcommerce360.com/2017/02/17/us-e-commerce-sales-grow-156-2016/. These businesses rely on *Quill*'s bright-line test to provide certainty as to the jurisdictions in which they must collect taxes. Yet, there is continuing state-level legislation and litigation challenging the *Quill* standard as States actively move to expand the reaches of their taxing jurisdiction. South Dakota's legislation—and its approach—is only one small piece of the changing landscape in which remote sellers now operate, and a ruling in this case may not resolve the constitutionality of other States' creative approaches to "substantial nexus" in the age of e-commerce.[10] As such, declining Petitioner's request

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[10] The benefit of the *Quill* standard is that it avoids the many variations on "substantial nexus" in the age of e-commerce. For example, a ruling on South Dakota's bill likely would not resolve the constitutionality of "cookie nexus" rules, like those in Massachusetts and Ohio where any business that operates a website that can be visited by residents of the State is construed to have nexus regardless of physical presence or "economic presence." *See* Michael A. Jacobs, et al., *Massachusetts to Move Forward With*

for certiorari is one step this Court could take toward maintaining remote sellers' well-settled expectations while Congress works to craft a comprehensive legislative solution.

III. *QUILL*'S BRIGHT-LINE TEST HAS CONTINUING VITALITY IN TODAY'S INCREASINGLY COMPLEX SALES AND USE TAX ENVIRONMENT

Petitioner's claims that *Quill* is outdated due to the growth of remote retail and the advancement of technology are misplaced. Despite its substantial size and growth, remote retail remains a small fraction of overall retail sales. Technological advancements, meanwhile, have not solved sales tax complexity, much less mitigated it to such a degree that the burden of collecting it is minimal.

South Dakota wouldn't be the first State, or even the first Dakota, to claim that technological revolutions have rendered collection of its desired tax easy for out-of-state sellers. Such an argument should not persuade the Court to grant certiorari or reconsider *Quill*. South Dakota is simply arguing what its one-state-up neighbor argued back in the 1990s.[11] *See*

New "Cookie" Nexus Regulation Effective October 1, Reed Smith Client Alerts (Sep. 15, 2017), https://www.reedsmith.com/en/perspectives/2017/09/ma-to-move-forward-with-new-cookie-nexus-regulation-effective-october-1; Alex Ebert, *Ohio "Cookie Nexus" for Online Sales Tax Likely to Crumble*, BNA News (July 12, 2017), https://www.bna.com/ohio-cookie-nexus-n730144 61659/.

[11] The North Dakota Supreme Court relied on the "burgeoning technological advances of the 1970s and 1980s [that] created revolutionary communications abilities and marketing methods which were undreamed of in 1967[,]" "increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering[,]" and "advances in the parcel delivery industry" to justify its

State v. Quill Corp., 470 N.W.2d 203 (N.D. 1991), *rev'd*, *Quill*, 504 U.S. 298 (1992). Just as toll-free telephones then were not a salve to sales tax complexity, iPads and augmented reality devices today are not a salve to sales tax complexity.

While remote retail has grown substantially since the internet's infancy in the early 1990s, it still remains a small share of the total retail sales picture in America. According to U.S. Census Bureau data, e-commerce sales have averaged less than 8.7 percent of total U.S. retail sales over the past four quarters, meaning that nine in ten purchases are still conducted in brick-and-mortar locations. U.S. Census Bureau, CB17-182, Quarterly Retail E-Commerce Sales: 3rd Quarter 2017 (Nov. 17, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. Traditional storefront retail remains the dominant model for a variety of reasons. Brick-and-mortar retailers can offer immediate gratification when purchasing an item, in addition to on-site support and service. Additionally, some items like fresh food do not lend themselves well to a remote sales model. Assertions that the *Quill* physical-presence standard is incompatible with a world dominated by e-commerce certainly do not apply in today's market, and are not likely to anytime soon as the retail industry converges on the so-called "brick-and-click" model mixing storefronts and internet sales. Barbara Thau, *Five Signs that Stores (Not E-Commerce) Are the Future Of Retail*, Forbes (June 27, 2017, 1:05 PM), https://www.forbes.com/sites/barbarathau/2017/06/27/five-signs-that-stores-not-online-shopping-are-the-future-of-retail/#aec81214641c.

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departure from the Court's precedent. *State v. Quill Corp.*, 470 N.W.2d at 208-09.

Meanwhile, sales tax complexity has arguably gotten worse in the years since *Quill* was handed down. In *Quill*, the Court noted that North Dakota's tax "illustrates well how a state tax may unduly burden interstate commerce." *Quill*, 504 U.S. at 313 n.6. Today, there are reportedly more than 12,000 taxing jurisdictions across the country, compared to the mere 6,000 that troubled the Court at the time of *Quill*. Compare *Tracking Sales Tax Rates* with *Quill*, 504 U.S. at 313 n.6.

This complexity simply cannot be solved by software, no matter how much more advanced it is than when *Quill* was decided in 1992. The most difficult part of sales tax compliance, particularly with regard to sellers of non-traditional items not easily classifiable under law, is always done by humans, and sales tax codes have not made their jobs easier in the last 25 years.[12] And even if software was omniscient enough to obviate the need for humans to categorize inventory for taxability, it remains expensive to build, integrate,

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[12] The reality of sales tax complexity is illustrated well by the dilemma of determining taxability of ice cream cakes in Wisconsin. The Wisconsin Department of Revenue produced a memo of nearly 1,500 words, including ten example scenarios, in an attempt to explain the appropriate tax treatment of ice cream cakes and dessert bars after a change in law effective in 2009. State of Washington Department of Revenue, Sales of Ice Cream Cakes and Similar Items, https://www.revenue.wi.gov/Pages/TaxPro/news-2010-101108c.aspx (last visited Dec. 6, 2017). It explains that a cake or ice cream bar made on site is taxable, while a cake purchased wholesale and sold to a customer is not taxable. However, if an otherwise tax-exempt cake is served to the customer with napkins or other utensils, that renders it taxable as prepared food despite being otherwise indistinct. Meanwhile, a cake with two cake layers and one ice cream layer is tax exempt, but a cake with one cake layer and two ice cream layers is taxable.

and manage, and burdensome to integrate and utilize.[13] For many small retailers, the expense and burden would outweigh the benefit and they would rationally choose not to sell into States with laws like South Dakota's.

Indeed, Petitioner tries to overcome these questions by relying on the asserted simplicity of the SSUTA. That reliance, however, begs the question—Is Petitioner going to ask the Court to rule that *Quill*'s physical-presence requirement can be abrogated only for those States that have adopted the SSUTA? States are not powerless to address the issues of sales tax complexity in a comprehensive way. In fact, the backbone of our economy is a codification of existing commercial law in state statutes (the Uniform Commercial Code, which governs the sales at issue here), not federal legislation. But just as the record of this case is not adequate to address the Due Process implications of South Dakota's legislation, it is equally inadequate to address the modest attempts by States

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[13] Take as an example an online retailer with annual sales of $5 million nationwide. Data compiled by NYU Stern finds online retailers average profit margins of just 2.97 percent, meaning that such a business only generates net income of $148,500 each year. NYU Stern School of Business, Operating and Net Margins by Industry (Jan. 2017), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html. This same business would pay roughly $80,000 in software setup and integration costs and incur $57,500 on software maintenance, updates, and fees. Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax*, TruST (Sep. 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf.

thus far to simplify and harmonize their tax administration.[14]

IV. RECONSIDERING *QUILL* HAS IMPLICATIONS BEYOND THE PARTICULAR APPROACH CHAMPIONED BY SOUTH DAKOTA AND EVEN BEYOND THE ISSUE OF REMOTE SALES TAX COLLECTION

It is not just in the realm of sales tax that States are boldly asserting tax authority over non-present businesses and individuals. Nebraska assessed business tax on a trucking company with no employees, no property, no inventory, and no sales in the State simply because the business had admitted its employees had driven through it. Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://www.city-journal.org/html/state-tax-grab-13628.html. Both New York and Connecticut have asserted authority to tax the income of a professor who lives in one State and commutes to the other. *Id.* California has effectively imposed strict regulations on the size of hen cages by denying access to the California market for any producer not meeting its standards, sparking a legal battle with other States. Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), https://www.pbs.org/newshour/nation/california-chickens.

As such, a grant of certiorari and eventual decision in this case has implications far wider than *Quill*, and far wider than tax collection on remote retail sales, no matter how fine a line this Court might try to draw.

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[14] State tax administration remains highly complex. For example, South Dakota's retail sales and service tax statute has more than 50 exemptions. S.D. CODIFIED LAWS § 10-45 (2017).

This case is not an outgrowth of uncertainty about Court doctrine, or the plain language of the Constitution, or an indifferent Congress. Rather, it is an outgrowth of a strong and growing trend of States asserting a power that they have not had since the days of the failed Articles of Confederation: the power to tax and regulate interstate commerce.

The current landscape of litigation developed despite Congress's and the Court's clear statements about the boundaries of state power. Should this Court grant certiorari, States may very well be emboldened to seize on even the thinnest of assertions to expand their reach. The Court will have to create a new bright line that improves upon *Quill*. With the advancement of technology and the ongoing internet revolution, States have more tools at their disposal than ever before to identify and target individuals and businesses for taxation and regulation and to focus on out-of-state individuals and businesses who lack the political influence and ballot-box resource with which to fight back.

CONCLUSION

For the foregoing reasons, Court should decline Petitioner's request for a grant of certiorari.

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